

On

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817 N.E. 63rd Street
Oklahoma City, OK 73105
(405) 843-9966 Phone
(405) 843-9852 Fax

FCC MAIL ROOM

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May 27, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D. C. 20554

RE: NextWave Telecom, Inc.
Petition for Stay
WT Docket No. 97-82

Dear Secretary Salas:

OnQue Communications, Incorporated (ONQ) is a C and F block PCS license holder for nine BTA markets within Oklahoma, Texas, Arkansas and Washington State. ONQ fully agrees with and supports the recent petition for stay, filed by Nextwave Telecom, Inc ("NextWave"), May 22, 1998. ONQ strongly adheres to the facts stressed in the filing that C block licensees cannot make an informed decision due to modifications of current FCC regulations (FCC 97-413), inter-departmental procedures between the Department of Justice and the FCC as well as the recent rulings regarding the Pocket and GWI bankruptcy proceedings. Unless and until these issues are resolved, no informed decision can be made by C block licensees.

ONQ requests that the FCC stay the C block "Election Date" of June 8, 1998 until all of the issues stressed in NextWave's filing have been resolved and enough time has been given to C block licensees to consider these resolutions so they can make an informed decision.

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Without the benefit of addressing these important issues prior to making a decision, C block licensees will suffer irreparable harm by choosing from a menu of options in which there is no complete foundational structure.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles C. Curtis', with a stylized, cursive script.

Charles C. Curtis
President

ATTACHMENT

CCC/ccc

cc: Chairman William Kennard
Commissioner Susan Ness
Commissioner Gloria Tristani
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules Regarding Installment
Payment Financing For Personal
Communications Services (PCS)
Licensees

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WT Docket No. 97-82

PETITION FOR STAY

**Michael Wack
Michael Regan
NextWave Telecom Inc.
1101 Pennsylvania Ave., N.W.
Suite 805
Washington, DC 20004
(202) 347-2771**

May 22, 1998

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SUMMARY

NextWave Telecom Inc. ("NextWave") respectfully requests that the Commission stay the C block "Election Date" of June 8, 1998. For the reasons set forth herein, the Election Date be stayed until a date not less than thirty days following: (1) resolution of procedural and substantive issues concerning the role of the U.S. Department of Justice ("DOJ") in implementing the alternative financing options the Commission has adopted in this proceeding; (2) Commission action on pending control group ownership and affiliation rules; and (3) Commission action that, in the wake of its proposed settlement in the Pocket bankruptcy proceeding and the recent federal bankruptcy court ruling involving General Wireless, Inc. (*GWI Decision*), establishes a framework of options for C block licensees that promotes the build out of their competitive PCS networks and eliminates distorted incentives to seek alternative financing arrangements in bankruptcy.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules Regarding Installment
Payment Financing For Personal
Communications Services (PCS)
Licensees

WT Docket No. 97-82

PETITION FOR STAY

NextWave Telecom Inc. (NextWave)¹ hereby respectfully requests, pursuant to Section 1.41 of the Commission's rules, 47 C.F.R. 1.41 and Section 416(b) of the Communications Act, 47 USC §416(b), that the Commission stay the C block "Election Date" of June 8, 1998.^{2/} For the reasons set forth herein, the Election Date must be stayed until a date not less than thirty days following: (1) resolution of procedural and substantive issues concerning the role of the U.S. Department of Justice (DOJ) in implementing the alternative financing options the Commission has adopted in this proceeding; (2) Commission action on pending

¹ NextWave is a holding company whose wholly owned subsidiaries, NextWave Personal Communications Inc. and NextWave Power Partners Inc., hold personal communications service ("PCS") licenses in the C block and D/E/F/ blocks, respectively.

^{2/} See Wireless Telecommunications Bureau Announces June 8, 1998 Election Date For Broadband PCS C Block Licensees, DA 98-741, rel. Apr. 17, 1998; see also Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order, 63 Fed. Reg. 17111 (Apr. 8, 1998) ("Second Restructuring Order").

control group ownership and affiliation rules; and (3) Commission action that, in the wake of its proposed settlement in the Pocket bankruptcy proceeding and the recent federal bankruptcy court ruling involving General Wireless, Inc. (GWI Decision),³ establishes a framework of options for C block licensees that promotes the build out of their competitive PCS networks and eliminates distorted incentives to seek alternative financing arrangements in bankruptcy.

I. INTRODUCTION

In the short time since the FCC adopted the Second Restructuring Order in this Docket, both the Commission and the wireless industry have been subjected to unprecedented developments and uncertainty.⁴ Until certain critical components of that uncertainty are removed, the C-Block designated entities ("DEs") for which Congress specifically charged the Commission with creating competitive opportunities are simply not in a position to make any informed decision.

Most importantly, issues that go to the core of the decisions each licensee must make on Election Day remain unresolved. The Commission and the DOJ have yet to announce whether C block restructuring options involving license surrender

³ See *In Re GWI PCS, Inc.* No. 397-39676-SAF-11 (Bankr. N.D. Tex., Apr. 24, 1998).

⁴ On May 8, 1998, numerous parties requested reconsideration of the Second Restructuring Order. Many of those parties requested relief which, if provided, would materially alter the license payment options available to many C block licensees, and would impact the decision making process of virtually every C block licensee.

and removal of associated debt obligations require the DOJ's approval, or, if such approval is required, what the procedures for securing such approval will be. Without certainty on this issue, C-Block licensees cannot know the effectiveness of any election they may make. In addition, certain core changes to the Commission's control group structure and affiliation rules that directly impact C-Block licensees remain in limbo.

Finally, while Congress has repeatedly admonished the Commission not to create a skewed regulatory approach that encourages bankruptcy rather than build out, this circumstance now exists. First, contemporaneous with its publication of the Restructuring Order, the Commission, whose staff had consistently advised C block participants in the Restructuring Process that there would be no separate deals in bankruptcy, officially entertained such a settlement in the Pocket proceeding. Further, barely two weeks after public notice of the Restructuring Order, a federal bankruptcy court ruled against the Commission on a constructive fraudulent transfer cause of action brought by GWI. The *GWI Decision* has made the options offered by the Commission to C block licensees totally impracticable within the current time schedule. Taken individually or as a whole, these considerations warrant staying the Election Date.

II. STANDARD

The Commission employs a four-factor test in determining

whether to stay an order.^{5/} The test requires assessment as to whether (1) a movant is likely to prevail on the merits; (2) a movant will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. These factors are not to be applied rigidly; rather, "[t]he test is a flexible one".^{6/} As the Commission has recently recognized, "a stay may be granted based on a high probability of success and some injury, or vice-versa".^{7/} In the current situation, all four factors support granting the instant motion and thereby staying the Election Date.

III. ARGUMENT

A. The Commission Has Publicly Conceded That C Block Licensees Currently Lack Information Critical To The Election Date Decision Process

On March 30, 1998, Chairman Kennard wrote a letter responding to questions posed by the leadership of the House Commerce Committee concerning resolution of unresolved, critical issues such as the Commission's Part 1 Re-write of attribution and control group rules,⁸ and coordination with the Department of Justice on debt forgiveness procedures for licensees electing

^{5/} Memorandum Opinion and Order, 12 FCC Rcd 21872, DA 97-2622, rel. Dec. 17, 1997 (Com. Car. Bur.) ("PCIA Stay Order"); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

^{6/} Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

^{7/} PCIA Stay Order, at n. 22, citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).

⁸ Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, FCC 97-413, rel. Dec. 31, 1997.

to return some or all of their C-Block spectrum. In that letter, Chairman Kennard conceded that resolution of these issues is critical to allowing C-Block licensees "to make business decisions with full knowledge of the governing rules." In his letter, Chairman Kennard also noted that the Commission would consider these issues in a timely manner so that licensees could make informed and meaningful decisions, specifically stating that the Commission would "insure adoption of the rules well in advance of the election date."

Chairman Kennard's letter demonstrates that the Commission fully appreciates that action on key issues is a prerequisite to holding an Election. As of this date, however, such action has not occurred. It is wholly unreasonable, arbitrary, and capricious for the Commission to force licensees to make critical business decisions involving the waiver of property rights without adequate information. Against this background, NextWave respectfully submits that it has made a substantial case on the merits, and that a stay should be granted in this instance.

**B. Absent a Stay, NextWave
Will Suffer Irreparable Harm**

The next factor to be addressed in any stay ruling, irreparable harm, also weighs strongly in favor of granting a stay in this instance. Here, a movant need demonstrate only harm which cannot be remedied for the "money, time, and energy necessarily

expended in the absence of a stay".^{9/} It is well settled that injury is "irreparable" if no practical remedy exists to repair it.^{10/} Thus, even where there are pending administrative appeals, if the proceeding is too protracted, equity may intervene.^{11/} Even recoverable administrative monetary loss may constitute irreparable harm "where the loss threatens the very existence of a movant's business".^{12/}

Were NextWave and other C-Block licensees forced to select from the current menu of options, the Commission would effectively guarantee substantial and irreparable harm to such licensees. Absent Commission action on the DOJ, Part 1 Rewrite, and GWI/Pocket issues, licensees will be forced to choose from a menu whose procedural foundation remains unconstructed. Given this uncertainty, business plans cannot be firmly negotiated. If licensees are forced to turn in one or more of their licenses under these circumstances, those licenses, which represent the essential charter of any wireless business, are gone. There are no articulated Commission procedures for retrieving them.

Even if subsequent recapture were a hypothetical possibility as an administrative matter, recapture would be unavailing as a matter of commercial fact. NextWave paid more than one-half

^{9/} Virginia Petroleum, supra, 259 F.2d at 925.

^{10/} Bannerkraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 356, at n.9 (D.C. Cir. 1972), rev'd on other grounds, 415 U.S. 1 (1974), vacated, 466 F.2d and 495 F.2d 1074 (D.C. Cir. 1974).

^{11/} See, Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591 (1926).

^{12/} See, Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

billion dollars for the property rights that derive from its C-Block licenses. Those licenses were acquired pursuant to a carefully crafted business plan. NextWave has entered into commercial relationships with equipment vendors and customers, based on that business plan. Any forfeiture of licenses would necessarily disrupt that plan and those relationships. The resulting disruption and losses could not be restored even if the licenses ultimately were retrieved because it is a fact of commercial life that, once vendors and customers move to establish new relationships, they are generally unwilling and often unable to resume their former relationships. Put simply, moving forward with an election while key issues remain unclarified, is a violation of the Commission's statutory charter to license spectrum in the public interest and its fiduciary responsibilities in its role as commercial lender to C block licensees.

NextWave and all other C block licensees do not have the option of retaining all of their licenses and allowing Election Day to pass without making an election, on the chance that the FCC or a court eventually will resolve pending issues. The Commission has made clear that Election Day is a one-time-only, all-or-nothing proposition, and that any entity that fails to choose alternative options that day has forsworn such alternatives forever. Thus, absent a stay, NextWave will be irreparably harmed.

C. A Stay Would Not Harm
Other Interested Parties

On this issue, a movant needs to show that issuance of a stay would not have a "serious adverse effect" on other interested persons.^{13/} The injury to other parties cannot be speculative or slight; rather, others must suffer some serious and palpable injury resulting from a grant of this petition. The only two categories of interested parties affected by this petition are: (1) other C Block licensees similarly situated to NextWave; and (2) potential participants in a C block reauction. No one in either category will suffer any measurable harm, much less a serious adverse effect, as a result of staying the Election Date.

The vast majority of C-Block Licensees would be relieved to have additional time to assess their options, work out disaggregation or partitioning arrangements, or otherwise finalize plans with respect to their spectrum. All face the same decision making process as NextWave, and today all have the same incomplete information on which to base such an important determination. In any event, grant of a stay would not delay any decision that they may desire to take. Indeed, the Commission has received numerous Petitions for Further Reconsideration that request action on the issues discussed herein prior to requiring licensees to make an election. None of those petitions have been acted upon at this writing. Thus, a stay would benefit, not harm, this category of interested party.

^{13/} Virginia Petroleum, *supra*, 259 F.2d at 925

Potential applicants for the upcoming FCC re-auction of C-Block spectrum also will not be harmed by a stay. Any argument that a stay could delay their entry into the marketplace is theoretical, not real. It is also speculative. There is no certainty, or even near certainty, that granting a stay will delay re-auctions, or that potential participants in such re-auctions will be the high bidder on any spectrum auctioned therein. In any event, whatever delaying effect a stay may have upon re-auctions is entirely within the Commission's discretion. Rapid and appropriate action by the Commission on the issues discussed herein will ensure that delay, if any, will be de minimis.

In sum, no substantial harm will come to any other interested party as a result of granting of this petition.

**D. Granting This Petition Will
Further The Public Interest**

The interests of private litigants must give way to the realization of public purposes.^{14/} In assessing where the public interest lies, the Commission must look first to its congressional mandate. When Congress granted to the Commission authority to conduct auctions, it directed the Commission to make genuine opportunities available to small business.^{15/} The mandate is a continuing one, as the Commission recognized when it determined that restructuring was necessary.

Congress' directive covers both substantive and procedural

^{14/} Virginia Petroleum, supra, 259 P.2d at 925.

^{15/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Sec. 6002(b), 107 Stat. 312 (1993).

decisions. In determining whether to grant this motion, the Commission must assess whether inaction will impair the opportunities available to small business. As detailed above, the Commission's decision to grant or deny a stay will undoubtedly have material and permanent consequences to NextWave and other similarly situated licensees.

Granting this petition will further the public interest. Giving NextWave and other C block licensees the information they need to make rational choices on election day will foster competition, preserve the economic viability of numerous small businesses, and expedite administrative action on the underlying issues which have lead to this petition.

Expediting administrative action is perhaps the key consideration here. NextWave has expressed its views to the Commission on all of the currently unresolved issues discussed in this petition. While NextWave believes those views should be adopted by the Commission, the overarching point here is how important is it for the Commission to make considered decisions and announce them expeditiously, prior to election day.

The public interest also favors preserving the viability of existing entities that have paid over \$1 billion to the federal government and commenced the construction and build-out of competitive PCS networks. Grant of a stay would also serve the public interest by enhancing competition. Business strategies advanced by C-Block licensees are consistent with, and in fact facilitate, the Commission's goals concerning the provision of

competitive telecommunications services and the participation of small businesses, women and minorities in the provision of such services. C block licensees should be given every reasonable opportunity to succeed in the marketplace, both because of what they have contributed to date and because of how they are positioned to contribute in the future by rapidly deploying competitive PCS services across the country.

IV. CONCLUSION

NextWave has demonstrated herein a reasonable basis for staying the Election Date. The decisions licensees must make when that day arrives involve, potentially, the voluntary alienation of their ultimate charter as regulated wireless carriers -- their licenses. It is nonsensical for NextWave and others to be required to make such decisions when the Commission itself has publicly admitted that information critical to the decision making process is not yet available. Under those circumstances, NextWave likely will prevail on the merits of its pending further reconsideration petition, which requests action on the DOJ, Part 1 Rewrite, and GWI issues prior to Election Day. NextWave also will be harmed irreparably in the absence of a stay. Other interested parties will not be injured in any meaningful way by grant of a stay, and the public interest would be served by such grant. For these reasons, NextWave respectfully requests that the instant petition be granted.

NextWave also respectfully requests that the Commission act on this request expeditiously.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Michael Wack", is written over a horizontal line.

Michael Wack
Michael Regan
NEXTWAVE TELECOM INC.
1101 Pennsylvania Ave., N.W.
Suite 805
Washington, D.C. 20004
(202-347-2771)

May 22, 1998

Certificate of Service

I, Tricia Hall, hereby certify that on this 22th day of May, 1998, a copy of the attached
Petition for was mailed via U.S. Post Office, first class postage prepaid, to the following:

Mr. Daniel Phythyon *
Mr. Gerald P. Vaughan*
Ms. Rosalind Allen*
Ms. Kathleen O'Brien-Ham*
Ms. Jeanine Poltronieri*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Ms. Amy Zaslov*
Ms. E. Rachel Kazan*
Ms. Sandra Danner *
Mr. Mark Bollinger *
Ms. Audrey Bashkin*
Ms. Julie Buchanan*
Mr. David Shiffrin*
Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

The Honorable William Kennard *
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Mr. John Nakahara*
Mr. Ari Fitzgerald*
Office of Chairman Kennard
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

The Honorable Susan Ness*
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Mr. James Casserly*
Mr. David Siddall*
Office of Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

The Honorable Harold Furchtgott-Roth *
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Mr. Paul Misener*
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Michael Powell *
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Ms. Jane Mago*
Mr. Peter Tenhula*
Office of Commissioner Powell
Federal Communications Commission

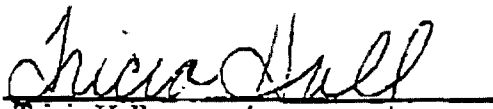
The Honorable Gloria Tristani *
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Mr. Rick Chessen*
Ms. Karen Gulick*
Office of Commissioner Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Mr. Lloyd Randolph
United States Department of Justice
1100 L Street NW Room 10008
Washington, DC 20005

Mr. Chris Wright, Esq.*
Mr. David Horowitz, Esq.*
Mr. Stewart Block, Esq.*
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W. 6th Floor
Washington, DC 20554

Jere W. Glover
S. Jenell Trigg
Office of Advocacy
U.S. Small Business Administration
409 Third Street, SW, Ste 7800
Washington, DC 20416


Tricia Hall

* Via Hand Delivery